STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIWAN DEMITRUS SHAW,

Defendant-Appellant.

UNPUBLISHED
October 24, 2006

No. 263511
Wayne Circuit Court
LC No. 05-001701-01

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a third-offense habitual offender, MCL 769.11, to 8 to 20 years in prison for the assault with intent to do great bodily harm conviction, three to ten years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court abused its discretion by allowing testimony of defendant's alleged involvement in a previous shooting that was unrelated to this case because such evidence only demonstrated his propensity to commit violent crimes. In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). The prosecutor moved to introduce other acts evidence, and the trial court granted the motion. There is evidence in the record that defendant objected to the admission of this evidence at the motion hearing, thus preserving the issue for appellate review. However, defendant did not provide the transcript of the hearing as required by MCR 7.210(B)(1)(a), so we have no record to review, and therefore, defendant has abandoned this claim on appeal. *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992); *People v Kelly*, 122 Mich App 427, 429-430; 333 NW2d 68 (1983).

Defendant next argues that the trial court erred by admitting Curtis Charles's testimony that Anton Holman identified defendant as the shooter during a phone conversation shortly after the incident took place, because this was hearsay that improperly bolstered Holman's identification testimony. We disagree. We review for an abuse of discretion a trial court's decision whether to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607

(1999). However, to the extent that this issue requires interpretation of the Michigan Rules of Evidence, our review is de novo. *Id*.

MRE 801(d)(1)(C) indicates that a prior statement is not defined as hearsay where the prior statement is one of identification, and the witness is available for cross-examination. *People v Malone*, 445 Mich 369, 376-377; 518 NW2d 418 (1994). Therefore, it is substantively admissible as nonhearsay. *Id*. at 378. The rule "does not require laying a foundation other than that the witness is present and found to be available for cross-examination." *Id*. at 377.

In this case, Holman knew defendant for a couple of years before the incident. Holman identified defendant to the police, the investigator, and to the judge at the preliminary examination and at trial. Holman also called his friend, Curtis Charles, and told him that Pete shot him. Charles testified that Holman was very shaken up during the phone call and that defendant was known as "Pete." The investigator testified that Holman identified defendant as one of the shooters and stated that he is also known as "Pistol Pete." Finally, defense counsel had the opportunity to cross-examine Holman regarding his identification of defendant, and during cross-examination, Holman specifically said he called Charles and told him he was shot. It was defense counsel's decision not to address that statement or to question Holman further about the subject. Therefore, Charles's testimony was admissible as nonhearsay under MRE 801(d)(1)(C).

In addition, even if Charles's testimony is considered hearsay, the evidence indicates that it would be admissible as an excited utterance. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998); MRE 803(2). Such a statement is considered more reliable because the declarant does not have the opportunity for reflection necessary for fabrication. *People v Straight*, 430 Mich 418, 423; 424 NW2d 257 (1988). There is no express time limit for an excited utterance. *Smith*, *supra* at 551. Rather, the focus of the exception is the lack of capacity to fabricate, not the lack of time to fabricate. *Straight*, *supra* at 425.

Defendant argues that the trial court overruled defense counsel's objection to Charles's testimony without requiring the prosecutor to establish that the testimony came within an exception. However, upon defense counsel's objection, the trial court specifically required the prosecutor to lay a foundation, and only after Charles testified about Holman's excitement was Charles allowed to testify regarding what Holman said. Charles testified that Holman called and told him that Pete shot him. Charles stated that Holman was very shaken up during the phone call and that defendant was known as "Pete." While Charles could not remember the exact time of the phone call, the testimony indicates that Holman was still in his car after having been shot twice and before he received medical attention. This testimony indicates that Holman was still under the excitement of being shot, which is unquestionably a startling event. The trial court did not err in admitting this testimony into evidence.

We affirm.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens